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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-519

JAMES NEWCOMB,

Petitioner,

— vs. —

JAMES BRENNAN and HENRY REUSS,

Respondents.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT, JAMES BRENNAN, IN OPPOSITION

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I.

FACTS

This case was presented to both the U.S. District Court for the Eastern District of Wisconsin and the Seventh Circuit Court of Appeals (see *Newcomb v. Brennan*, 558 F. 2d 825 [7 Cir., 1977]) solely upon the complaint of the plaintiff and the motions to dismiss interposed by both defendants. Therefore, at this stage of proceedings, the facts now before this court for consideration are the well-pled allegations of the com-

plaint (see *National Van Lines, Inc. v. United States*, 326 F. 2d 362, 372 [7 Cir., 1964] and *United Milk Prod. Co. v. Michigan Ave. Nat. Bank of Chicago*, 401 F. 2d 14 [7 Cir., 1968]); all reasonable inferences which can be drawn from those well-pled allegations (see *Curtis v. Everette*, 489 F. 2d 516, 518 [3 Cir., 1973]); and facts of "common knowledge" such as state statutes and local ordinances, of which the court can take judicial notice (see *Robinson v. Mammoth Life and Accident Insurance Co.*, 454 F. 2d 698, 699 [7 Cir., 1971] [per curiam], cert. denied 409 U.S. 872 [1972]).

Thus, the facts properly before the lower courts for consideration were as follows:

First, the petitioner alleges in paragraph 1 of the complaint that ". . . prior to May 3, 1976 he was employed . . . as the Deputy City Attorney of the City of Milwaukee." (A.P. 16)

It is submitted that the title of "Deputy City Attorney of the City of Milwaukee" is a term of art which finds its definition in certain statutes and ordinances of the State of Wisconsin and the City of Milwaukee; and therefore, the District and Circuit Courts properly took judicial notice of those statutes and ordinances in their deliberations relative to defendants' motions to dismiss.

The deputy city attorney's position is initially described in Sec. 3.03, Milwaukee City Charter, as follows:

> ". . . He [the city attorney] shall have power to appoint a deputy city attorney, who *shall be authorized to do all acts required by law of the City Attorney . . .*" (Emphasis added) (Since amended 5/24/77)

The duties of the Milwaukee city attorney are described in the initial part of that Charter Ordinance as follows:

> "The City Attorney shall conduct all the law business of the corporation and of the departments thereof, and all other law business in which the city shall be interested, when so ordered by the Common Council. He shall, when required, furnish written opinions upon subjects submitted to him by the Mayor or the Common Council, or any of its committees, or any other department of the municipal government. He shall keep a docket of the cases to which the city may be a party in any court of record as directed by the Common Council, in which shall be briefly entered all steps taken in each cause, and which shall, at all times, be open to the inspection of the Mayor, Comptroller or any committee of the Common Council. It shall also be the duty of the City Attorney to draft ordinances, bonds, contracts, leases, conveyances, and other such instruments of writing as may be required by the business of the city; to examine and inspect tax and assessment rolls, and all proceedings in reference to the levying and collection of taxes and assessments; and to perform such other duties as may be prescribed by the charter and ordinances of the city. . . ." (Since amended 5/24/77)

There is no term of office for the deputy city attorney set forth in the Charter nor is he subject to civil service. In fact, he is specifically exempted from civil service by Sec. 63.29(1), Wis. Stats., which reads:

"*Civil service for attorneys in office of city attorney.* (1) In any city of the first class the common council may by ordinance provide for civil service in the office of the city attorney except for the city attorney and his deputy."

The position of deputy city attorney is also described in Sec. 2-220.2(2), Milwaukee Code of Ordinances:

"(2) DEPUTY CITY ATTORNEY.

"There is hereby created the position of deputy city attorney who shall be appointed by the city attorney and such position shall not be under civil service, and the city attorney *shall be responsible for all the acts of such deputy city attorney.* The deputy city attorney may be selected from among the assistant city attorneys in the office of the city attorney and, if so selected from among such group, while serving as deputy city attorney, such assistant shall continue to retain his civil service status and tenure provided for in this ordinance. The deputy city attorney shall be required to take the oath of office as provided in the charter and *may perform all duties and have all responsibility which are imposed by law in the ordinances and charter ordinances of the city on the city attorney.* (Emphasis added) (Since amended 5/24/77)

It should be noted that the above ordinance does provide civil service status and tenure at the level of assistant city attorney to a deputy city attorney who has been selected from among the group of assistant city attorneys; however, petitioner has not pled, nor would the evidence show, that he was selected from among the group of assistant city attorneys.

Therefore, the petitioner had neither tenure nor civil service status in his position of deputy city attorney. He, in effect, served at the pleasure of the city attorney, who in this case was the respondent Brennan.

The petitioner further alleges at paragraph 6 of the complaint (A.P.) that ". . . defendant Brennan did communicate with the defendant Reuss . . . prior to the formal announcement by plaintiff of his candidacy, and that the defendant Brennan did conspire with the defendant Reuss . . . and agreed to attempt to coerce the plaintiff to persuade him to withdraw his proposed candidacy by threatening to terminate his employment." While this allegation must be taken as true for purposes of the instant motion to dismiss, it is submitted that if the facts were ever fully developed, which will not occur in light of the sustainability of the lower courts' orders, that this allegation would be shown to be untrue.

Petitioner then alleges at paragraph 10 of the complaint (A.P. 18) that ". . . the defendant Brennan did wrongfully discharge the plaintiff from his employment solely because plaintiff continued his intention to run against defendant Reuss."

Thus, in ruling upon the instant motion to dismiss, the lower courts properly took into consideration the statutes and ordinances describing the position of deputy city attorney and concluded that the petitioner occupied a non-tenured policy-making position; and further, after their review of the complaint, they properly drew the "reasonable inference" from the well-pled paragraphs of the complaint set out above

that a political dispute, culminating in the petitioner's discharge, had arisen between the petitioner and respondent Brennan and that the dispute was based upon the petitioner's decision to oppose defendant Reuss ". . . in the primary election of the Democratic party." (A.P. 17)

The District Court, taking into consideration the above factual matters, granted the defendants' motions to dismiss the plaintiff's complaint. The plaintiff appealed that decision to the Seventh Circuit Court of Appeals. The Seventh Circuit affirmed, and the plaintiff then instituted the instant petition for a writ of certiorari requesting that this court review that affirmance.

II.

ARGUMENT

A. PETITIONER'S FIRST QUESTION AND SUBPART (B) OF HIS SECOND QUESTION DO NOT PRESENT APPROPRIATE QUESTIONS FOR REVIEW ON CERTIORARI.

The petitioner's petition presents two question for review in his petition. The first of the questions appears to be related to subpart (B) of the second question; therefore, respondent Brennan will treat both of those questions together. Those questions are:

> "1. Under *Elrod v. Burns* (1976) 427 U.S. 347 is it a violation of the United States Constitution for a deputy city attorney in a non-partisan office to be fired from his employment because he runs for Congress of the United States?

> "2. Did the Circuit Court of Appeals err . . . (B) in its determination that the petitioner's First Amendment rights were outweighed by the interests of the respondents; . . ."

The general consideration governing whether or not this court will undertake of review of a matter on certiorari are set forth in U.S. S. Ct. Rule 19, 28 *U.S.C.A.*

The petitioner has not indicated which, if any, of the Rule 19 grounds might be applicable to any questions that he has presented for review.

He does, however, assert at page 5 of his petition that this case ". . . INVOLVES AN ISSUE OF FIRST IMPRESSION." He bases this assertion on Judge Swygert's statement that:

> ". . . neither *Elrod* nor *Lewis* squarely faced the question of whether the policymaker exception should be extended beyond the paradigm situation in which a dismissed employe would, by the nature of his political affiliation, retard the effectuation of a new administration's policies.
>
> "We therefore must determine as a matter of first impression whether the state's interest in permitting Brennan to fire plaintiff outweighs plaintiff's First Amendment rights. . . ." (A.P. 8)

Therefore, in regard to his first question and subpart (B) of his second question, petitioner is apparently asserting that the Seventh Circuit Court ". . . has decided an important question of federal law which has not been, but should be, settled by this court; . . ." U.S. S. Ct. Rule 19(b), 28 *U.S.C.A.*

For several reasons, respondent Brennan would submit that the question of federal law presented by the petitioner's first question and by subpart (B) of his second question, has already been fully resolved by this court's decision in *Elrod v. Burns*, 427 U.S. 347, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976). However, this assertion should not be construed as an attempt to file a cross petition for review of the Seventh Circuit Court decision, for it is submitted that the result arrived at by the Seventh Circuit Court was entirely consistent with *Elrod* and needs no further review by this court. The only point that respondent Brennan wants to urge upon the court is that the result reached by the Seventh Circuit in this case could have been arrived at while still remaining within the parameters of *Elrod*.

As noted above, the reason the Seventh Circuit considered its decision in the instant matter as a case of first impression is because Judge Swygert concluded that ". . . neither *Elrod* nor *Lewis* squarely faced the question of whether the policy-maker exception should be extended beyond the paradigm situation in which a dismissed employee would, by the nature of his *political affiliation*, retard the effectuation of a new administration's policies." (Emphasis added) (A.P. 8)

However, it is submitted that a closer review of the "paradigm situation" in *Elrod* discloses that it may well have been broader than that described by Judge Swygert; for the issue presented to this court in *Elrod* was ". . . whether public employees who allege that they were discharged or theatened with discharge solely because of their partisan political affiliation or *non-affiliation* state a claim for deprivation of constitutional rights secured by the First and Fourteenth Amendments." (Emphasis added 49 L. Ed. 2d at 551.

Therefore, the question of whether or not an individual could be discharged because he or she *refused to affiliate* with any partisan political party was also considered in *Elrod*. In other words, this court recognized in *Elrod* that a publicly elected official may also question the "political loyalty" of a policymaking subordinate based upon that subordinate's choice to remain a political *non-partisan*.

Hence, *Elrod* did not deal, as petitioner asserts at pages 5 and 6 of his petition, solely with the First Amendment rights of members of the opposing political party. Rather, it is submitted that in *Elrod* this court dealt with the broader question of the circumstances under which a public employe's First Amendment rights must be subordinated to the public interest of ensuring ". . . that policies which the electorate has sanctioned are *effectively* implemented. . . ." (Emphasis added) 49 *L. Ed.* 2d at 565; and this court concluded that that public interest could be fully satisfied by limiting that subordination to "policymaking positions."

Therefore, whether a political dispute which arises between a publicly elected official and a non-tenure policymaking subordinate arises on the level of partisan politics, non-partisan politics, or intraparty politics is not of great importance. What is of importance is the determination of whether or not, as a result of that dispute, the will of the electorate will be frustrated because an elected official is forced to rely upon the services of a policymaking subordinate from whom he

can no longer demand complete loyalty, and that is exactly the determination that Judge Swygert made when he stated that:

> "The elected official responsible for setting the policy of the city attorney's office is the city attorney himself. One of the major problems that he confronts in his job is ensuring that his policies are carried out by his subordinates, and that any policycreating decisions made by those subordinates conform with the broad objectives he chooses to pursue. This problem would become a nightmare for the city attorney unless he could demand the absolute loyalty of his policymaking deputy. If he lost confidence in his deputy, for whatever reason, his ability to perform his job would be severely hampered. Moreover, once an open rift developed between the city attorney and his deputy — even if the basis for the feud were unrelated to actual job performance — the city attorney's office could become a battleground in which little was accomplished, to the detriment of the citizens of Milwaukee. It is presumably for this reason that the Milwaukee City Charter and City Code permit the city attorney unfettered discretion to select his deputy and exclude the position of deputy city attorney from the civil service tenure which lesser attorneys in the city attorney's office receive." (A.P. 8-9)

Therefore, while *Elrod* did not precisely deal with the question of the need for political loyalty on the level of non-partisan or intraparty politics (although as noted above, it did speak in terms of the First Amendment rights of non-partisan employes), it did deal with the more fundamental question of the circumstances under which a public employe's First Amendment rights must be subordinated to the vital

public interest of ensuring that the policies sanctioned by the electorate are effectively implemented; and it was this court's response to that question in *Elrod* that the Seventh Circuit correctly applied to the allegations of the petitioner's complaint.

Further, *Elrod* (see 49 L. Ed. 2d at p. 556, footnote 11) is also based in part upon a footnote in this court's decision in *Pickering v. Board of Education*, 391 U.S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968). *Pickering* dealt with the discharge of a teacher because of his exercise of his First Amendment rights. In examining that discharge, Mr. Justice Marshall concluded that:

> ". . . Appellant's employment relationships with the Board and, to a somewhat lesser extend, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that *personal loyalty* and confidence are necessary to their proper functioning. . . ." (Emphasis added) 20 L. Ed. 2d at 818

However, in footnote 3 the court recognized that:

> "3. It is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal. Likewise, positions in public employment in which the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them can also be imagined. We intimate no views as to how we would resolve any specific instances of such situations,

but merely note that significantly different considerations would be involved in such cases." 20 L. Ed. 2d at 818

Therefore, the "policymaker" exception enunciated in *Elrod* first arose in the context of a totally *non-partisan* controversy between a teacher and a university Board of Regents, and this court concluded that even on such a non-partisan level there was a possibility that the need for personal loyalty would justify the discharge of a person in a policymaking position.

Thus, the Seventh Circuit application of the *Elrod* doctrine in the instant matter was squarely consistent with the case law, i.e., *Pickering*, upon which that doctrine was, in part, founded.

Hence, it is submitted that the "important question of federal law," which is presented by the instant matter, has already been resolved by this court's decision in both *Elrod* and *Pickering*; and thus, the petitioner's request for certiorari should be denied.

Further, it is significant to note that it was the Seventh Circuit that developed much of the underlying case law, i.e., *Illinois State Employees Union, Council 34, Etc. v. Lewis*, 473 F. 2d 561 (7 Cir., 1972) and *Burns v. Elrod*, 509 F. 2d 1133 (7 Cir., 1975), which formed part of the basis for this court's decision in *Elrod*. Therefore, that circuit is in an excellent position to apply the "policymaker" exception enunciated in *Elrod* to fact situations, which while not being precisely the same as *Elrod*, are highly analogous to the facts dealt with in *Elrod*; and it is submitted that the instant fact situation clearly fits in to that category.

Further, petitioner argues in response to subpart (B) of his second question that there was no "feud" between himself and respondent Brennan; however, his complaint establishes the exact opposite (see par. 7 and 10 of the complaint at A.P. 17-18). For if a political disagreement which results in threats of a discharge, and ultimately a discharge cannot be characterized as a "feud", which could justifiably lead respondent Brennan to question the petitioner's loyalty, then it would be hard to conceive of any fact situation that could be so characterized.

Also of significance is the fact that the petitioner makes no assertion that he was not a policymaker.

Therefore, the Seventh Circuit had before it a complaint which established that the petitioner was a policymaking employe who was fired because his loyalty to his superior had been called into question by his decision to chart a political course contrary to that endorsed by his superior, and the Seventh Circuit correctly applied the teachings of *Elrod* and *Pickering* to those facts by concluding that the petitioner had failed to state a claim upon which relief could be granted.

B. SUBPART (A) OF PETITIONER'S SECOND QUESTION DOES NOT PRESENT AN APPROPRIATE QUESTION FOR REVIEW ON CERTIORARI.

The petitioner also presents two further questions for review. The first of those is:

> "2. Did the Circuit Court of Appeals err (A) in holding that the petitioner served 'at the pleasure' of his employer; . . ."

The petitioner argues in response to that issue that the District Court and the Circuit Court erred by taking "judicial notice" of the statutes and ordinances which describe the position of Milwaukee deputy city attorney, and that by so erring, the petitioner was prevented from presenting to the court, in the context of a motion for summary judgment, other applicable ordinances which would have established that the petitioner did not serve at the pleasure of respondent Brennan. In other words, the petitioner is apparently asserting that he had some sort of a property interest in his deputy city attorney position.

It is interesting to note that the petitioner's argument that he had a property interest in his deputy city attorney position is not addressed in either the District Court's (A.P. 11-14) or the Circuit Court's (A.P. 1-10) opinion; and the reason for this lack of discussion is quite simple; namely, the petitioner never pled in his complaint that he had a property interest in his position. He never made an argument on that point to the District Court, and his brief to the Seventh Circuit Court is also totally devoid of any such argument. Finally, he has not even chose to submit copies of the Milwaukee ordinances establishing his claimed property right in his Appendix to the instant petiton.

Therefore, the petitioner is, in effect, asking this court to undertake a review of this issue without first adequately presenting it to the lower courts; however, this court has always taken a dim view of that sort of advocacy. In *United States v. Ortiz*, 422 U.S. 891, 45 L. Ed. 2d 623, 95 S. Ct. 2585 (1975), Mr. Justice Powell stated:

> "The Government also contends that even if Almeida-Sanchez applies to checkpoint searches, the Court of Appeals erred in voiding this search because it occurred after the date of decision in Almedia-Sanchez but before the Court of Appeals stated in United States v. Bowen, supra, that it would require probable cause for checkpoint searches. Examination of the Government's brief in the Ninth Circuit indicates that *it did not raise this question below*. . . . We therefore *decline to consider this issue*, which was raised *for the first time in the petition for certiorari*." (Emphasis added) (at pp. 629-630)

Also, see *Beck v. Washington*, 369 U.S. 541, 8 L. Ed. 2d 98 at 107, 82 S. Ct. 955 (1962).

Therefore, before even considering whether or not subpart (A) of petitioner's second question merits any consideration under any of the Rule 19 criteria, respondent Brennan would submit that this court should follow the *Ortiz* and *Beck* approach and deny certiorari on that question because the petitioner failed to adequately present it to the lower courts.

However, even viewing that question in the context of the Rule 19 considerations, it is submitted that there is no reason for this court to entertain it on certiorari, and again the petitioner himself fails to advance any such reason.

What in effect the petitioner has done in subpart (A) of his second question is to ask this court to construe the local ordinances of the City of Milwaukee in order to determine whether or not he had some property interest in his deputy city attorney position.

However, this court has consistently held that such a determination is a matter of construction of state and local laws rather than federal constitutional law. (See *Board of Regents v. Roth*, 408 U.S. 564 at 577, 33 L. Ed. 2d 548 at 561, 92 S. Ct. 2701 [1972].) Since this question primarily relates to application of local laws, it is also not a matter for which this court should undertake a review (see *Wolf v. Weinstein*, 372 U.S. 633, 10 L. Ed. 2d 33 at 39, 83 S. Ct. 969 [1963]).

Further, the procedural question posed by the petitioner is resolved by the application of well-settled case law which clearly establishes the right of a federal court, in the context of a motion to dismiss, to take "judicial notice" of facts of common knowledge (see *Robinson v. Mammoth Life and Accident Insurance Co.*, *supra*, at p. 699); and specifically, courts must take "judicial notice" of state statutes applicable to the cause of action under consideration (see *McIndoo v. Burnett*, 494 F. 2d 1311 at 1313 (8 Cir., 1974) and *Merriam v. Kunzig*, 476 F. 2d 1233 at 1239 [3 Cir., 1973]). In fact, the petitioner could have, although he chose not to, asked the lower courts to take judicial notice of the ordinances upon which he now is attempting to rely.

Therefore, when the petitioner pled that ". . . he was employed by the City of Milwaukee as the *Deputy City Attorney* of the City of Milwaukee", (A.P. 16) (Emphasis added), he brought before the court those statutes and ordinances which describe the nature and duties of that position. Those provisions are set forth in the statement of facts, *supra*, and footnotes 2-4 of the Circuit Court's opinion (A.P. 2-3); and it was from those statutes and ordinances that both the District Court

and Circuit Court concluded that the position of deputy city attorney was a policymaking position, a point which the petitioner apparently does not dispute, and that the person serving in that position served at the pleasure of the city attorney.

Further, the lower court's decision with regard to the second point above is consistent with the case law of the State of Wisconsin.

That case law is set forth in two Wisconsin Supreme Court cases which deal with the question of removal from public office where there is no fixed term or tenure rights associated with that office.

The first is *State ex rel. Wagner v. Dahl*, 140 Wis. 301 at 303, 122 N.W. 748 (1909), in which the Wisconsin Supreme Court stated that:

> "It is a well-nigh universal rule that where no definite term of office is fixed by law the *power to remove an incumbent is an incident to the power to appoint*, in the absence of some constitutional or statutory provision to the contrary. . . . Our law does not regard an office as a property right. Neither is the right to hold office a vested one. . . ." (Emphasis added)

The second Wisconsin case is *Ekern v. McGovern*, 154 Wis. 157 at 244, 142 N.W. 595 (1913), in which the Wisconsin Supreme Court stated that:

> " 'The general rule is that *where a definite term of office is not fixed by law, the officer, or officers by whom a person was appointed to a particular office may remove him at pleasure, and without notice, charges, or reasons assigned.* . . . It is conceded, in

all the cases, that where a fixed term is assigned to the office, the appointing power has no absolute power of removal.' Throop, Public Officers, §354." (Emphasis added)

Further, the petitioner's only argument in opposition to the conclusion that he served at the pleasure of respondent Brennan (an argument which, as noted above, is for the first time being adequately presented for judicial scrutiny) is based upon a totally erroneous interpretation of Sec. 4.28 of the Milwaukee City Charter and Sec. 2-3 of the Milwaukee Code of Ordinances.

The intent and construction of those provisions is established by the introductory subsection of Sec. 4.28 of the Milwaukee City Charter which reads as follows in sub. (1):

"4.28 *Common council, power to dismiss officers for malfeasance; investigation procedure and hearing.* (1) A majority of all the members elect of the common council shall have power to dismiss from office, for malfeasance in office in said city, any person elected or appointed to office in said city, except justices of the peace. And the common council shall provide by ordinance the manner of hearing and disposing of complaints against such officers."

That subsection makes it clear that the power to dismiss, which is delineated thereunder, is a power of the Common Council to dismiss elected or appointed officials for malfeasance in office; in other words, an impeachment procedure. However, that provision has no effect on the *collateral power of the city attorney* to remove his deputy who serves at the city attorney's pleasure.

Therefore, while the Common Council can remove an appointed official such as the deputy city attorney only for "malfeasance" in office and only in accordance with Sec. 4.28 of the Milwaukee City Charter and Sec. 2-3 of the Milwaukee Code of Ordinances, the city attorney may remove his deputy for any reason, with the possible exception of a reason based upon racial, sexual, or religious basis. To hold otherwise would be tantamount to saying that once a deputy city attorney is appointed, he has a right to retain his position, in the absence of malfeasance in office, even if the city attorney who appointed him had come to doubt his deputy's loyalty or had been defeated in an election and the new city attorney wished to appoint a new policymaking subordinate loyal to him. Such a holding would be contrary to and destructive of the city attorney's authority to appoint his deputy secured by Sec. 3.03 of the Milwaukee City Charter and Sec. 2-220.2 (2) of the Milwaukee Code of Ordinances (A.P. 3); and it would also render meaningless the deputy city attorney's exclusion from the tenure status conferred on other members of the City Attorney's Office by the Civil Service system in accordance with Sec. 63.29(1), Wis. Stats. (A.P. 2).

Therefore, while it is true that the petitioner, and respondent Brennan for that fact, could be removed by the *Common Council* only on the basis of malfeasance in office, the ordinances of the City of Milwaukee and statutes and case law of the State of Wisconsin, in delineating the relationship between the city attorney and his deputy, clearly establish that the deputy city attorney serves at the pleasure of the city attorney.

Finally, respondent Brennan has dealt with the merits of the petitioner's argument on this point only to establish that had the petitioner properly presented that argument to the lower tribunals, they would have found it without merit; however, since it was not properly presented and since even if it had been, it would not rise to the dignity of an issue which should be reviewed by this court under the Rule 19 criteria, it is submitted that this court should deny review of that issue.

C. SUBPART (C) OF PETITIONER'S SECOND QUESTION DOES NOT PRESENT AN APPROPRIATE QUESTION FOR REVIEW ON CERTIORARI.

The final question that the petitioner proposes is:

> "2. Did the Circuit Court of Appeals err . . .(C) in failing to address the equal protection cause of action pleaded as a second cause of action in the complaint?"

As with subpart (A) of the petitioner's second question, that issue was not properly raised before either the District Court or Circuit Court.

That failure explains the absence of any discussion of the second cause of action by either of the lower courts in their written decisions.

Hence, while it is true that the petitioner advanced his second cause of action in his pleadings, he effectively abandoned it in subsequent proceedings before the District and Circuit Courts by failing to make any argument on that cause. Therefore, in light of this court's holdings in *United States v. Ortiz, supra,*

and *Beck v. Washington, supra,* this court should decline to consider subpart (C) of the petitioner's second question since it ". . . was never properly presented to the [lower courts] . . ." *Beck v. Washington, supra,* at p. 107.

The reason for the petitioner's abandonment of his second cause of action may well have been the realization of that cause's lack of merit. A review of the limited argument on this point in his petition would seem to substantiate that belief; and, again, as with all the other questions that he has presented for review, the petitioner fails to mention which Rule 19 consideration would be brought into play by his second cause of action. Respondent Brennan would submit that there are none; and hence, even if this cause had been argued in the lower courts, it would not have changed the ultimate result reached by those courts nor would it have presented an issue for review by this court.

The meritless nature of petitioner's second cause of action becomes evident upon close examination of that cause, and more specifically, close examination of paragraph 16 of the complaint (A.P. 19).

The effect of that allegation is to assert that petitioner's right to equal protection under the law was denied by the "policy and practice" of a public official or public agency which he fails to identify, which allowed ". . . attorneys employed as city attorneys in the City of Milwaukee, or district attorneys in the County of Milwaukee to conduct political campaigns and pursue election to political office while retaining their positions on the staff of the municipal or county agencies." (A.P. 19)

Therefore, we initially are not told who or what promulgated this "policy and practice" and whether or not that promulgation was made "under color of law", a necessary element for recovery under 42 *U.S.C.A.* §1983. See *Adickes v. Kress & Co.*, 398 U.S. 144 at 150, 26 L. Ed. 2d 142 at 150, 90 S. Ct. 1958 (1970); however, what is clear is that neither of the respondents could have been responsible for the complained of "policy and practice" since the positions of Milwaukee city attorney and deputy city attorney and the position of Milwaukee County district attorney were created either by the Milwaukee Common Council pursuant to Sec. 3.03 of the Milwaukee City Charter or by the Legislature of the State of Wisconsin pursuant to Sec. 59.12, Wis. Stats. Therefore, if there was a constitutionally impermissible classification created because of the distinctions between the post of the district attorney or city attorney and the post of the deputy city attorney, those impermissible distinctions would be attributable to the legislative bodies creating the positions and not to the individual serving in them.

Further, it is hard to conceive of any possible relationship between the post of Milwaukee County district attorney and the post of Milwaukee deputy city attorney; and the petitioner has continued to keep this respondent and all of the various levels of the federal judiciary guessing as to what that relationship could be.

Thus, when the petitioner argues at pages 8-9 of his petition that his second cause of action asserts that ". . . the right to engage in active politics and run for

elective office was one *recognized in the community* and a right afforded those in similar employment. . . ." (Emphasis added); he fails to inform this court, and had totally failed to inform the lower courts, as to who or what was responsible for affording that supposed right and as to whether or not that public body or public officer was acting "under color of law" when the right was afforded.

The remainder of the petitioner's argument on this point presents facts totally dehors to the record and, therefore, merits no response.

Thus, as with the respondent's argument in opposition of subpart (A) of this second question, the merits of this final question were addressed solely for the purpose of demonstrating that had the petitioner properly presented his arguments on this cause in the lower courts, those tribunals still would have found it without merit; however, the introductory considerations outlined above clearly establish that, as with subpart (A) of petitioner's second question, this question was not properly presented in the lower courts; and even if it had been, the petitioner has not established, under any of the Rule 19 criteria, that this court should undertake a review of subpart (C) of his second question.

III.

CONCLUSION

For the numerous reasons asserted above, it is respectfully requested that this court deny the instant petition for a writ of certiorari.

Respectfully submitted,

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